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332-619—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 922

RICHARD WALTER BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 402 F. 2d 536.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1968. A petition for rehearing was denied on November 13, 1968. On December 7, 1968, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January 12, 1969, and on January 9, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a conscientious objector, convicted of refusing to accept alternate civilian employment, was

deprived of due process because the local board ordered him to report to work different from that which he then held and offered to continue performing in fulfillment of his Selective Service obligation.

STATEMENT

Petitioner was convicted of refusing to accept alternate civilian employment, in violation of 50 U.S.C. App. 456(j) and 462(a), and was sentenced to three years' imprisonment (I R. 23, 24).[1]

Petitioner was originally classified 2–S (G.X. 3, 11). Thereafter he requested reclassification as a conscientious objector (G.X. 15), but was given a 1–A classification (G.X. 3, 11). He requested a personal appearance before his local board (G.X. 26), and as a result of that appearance was classified 1–O (G.X. 31).

Petitioner received his preinduction physical examination on May 5, 1966 (G.X. 32–38), and a statement of acceptability was mailed to him on that date (G.X. 41). On the previous day, he sent a letter to his local board stating that he had obtained a civil service position as animal keeper at the Los Angeles Zoo.[2] He

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[1] "R." indicates the record in this Court, which is in three volumes. "G.X." indicates petitioner's selective service file, which was introduced during trial as a government exhibit. A certified copy of this file has been lodged with this Court.

[2] He had obtained this position on March 14, 1966, prior to his personal appearance at the local board at which he was granted a 1–O classification. Previous thereto, he had worked as a kennel man at a private animal hospital, a position he had held at the time he requested a personal appearance before the board to contest his 1–A classification. The summer before, prior to his application for 1–O classification, he had worked as an animal keeper at a private zoo (G.X. 47).

said in the letter that it was his "intention to put in my two years alternative service in this position as soon as my six months probation period is completed," because he found the position "very rewarding, besides serving the public interest in a truly beneficial and educational way" and felt that "this is the position that I best qualify for and best serve the public in" (G.X. 42). When he thereafter received SSS Form No. 152—upon which he was to list in order of preference three types of approved civilian work selected from the list maintained by his local board—he returned the form with that portion of it left blank. Instead, he listed—on another portion of the form set aside for indicating acceptance of a work application by "an approved employer for civilian work contributing to the national health, safety, or interest"—his civil service position as animal keeper, noting that he had completed two months of the six months probation period (G.X. 45). He also enclosed a note stating that, due to his hours of employment, he had been unable to come to the local board office to peruse its list of approved civilian work, but that he thought, although he was not sure, that his position was probably on the list (G.X. 46).[3]

[3] When asked, at his personal appearance contesting his 1-A classification, whether he would take a civilian job in lieu of induction into the armed forces, he replied in the affirmative and volunteered the information that he was then working for civil service. The board informed him that that was not one of the jobs approved, and told him that he could come to the office and see the list of approved agencies (G.X. 31).

The local board thereupon requested the state director to suggest three types of available appropriate civilian employment which it could, in conformity to Selective Service Regulation 1660.20(b) (Pet. App. A20), submit to him (G.X. 50). The state director suggested institutional helper at the Los Angeles County Department of Charities, truck driver helper for Goodwill Industries, and psychiatric technician trainee at Atascadero State Hospital (G.X. 51). The three positions were submitted to petitioner, and he refused all three (G.X. 52). He gave as his reason that his position as animal keeper was "productive and rewarding work," and that he felt "that there is, for me, no better way to serve the public than to keep my position as an Animal Keeper at the greatest zoo in the world" (G.X. 53).

The local board then, in accordance with Selective Service Regulation 1660.20(c) (Pet. App. A21), met with petitioner and a representative of the state director in order to attempt to arrive at a mutual agreement as to the work which petitioner would perform (G.X. 54–61). At the meeting, petitioner stated that, while he had no specific objection to the three positions submitted to him by the local board, he felt that the work he was doing was "more in keeping with my training and background and my abilities" (G.X. 58). He insisted that the work met the criterion of contributing to national health, safety and interest, although the board pointed out to him that everybody could personally classify his job as meeting that criterion but that it did not recognize all government jobs as fulfilling the Selective Service obligation (G.X. 60–61). Petitioner was offered an opportunity

to select any other position from the approved list, but stated, after perusing the list, that he saw nothing on it that he could take (G.X. 59–60). He acknowledged that he was holding out for employment as an animal keeper (G.X. 60).

Thereafter, the local board, in accordance with Selective Service Regulation 1660.20(d) (Pet. App. A21), selected the position as institutional helper at the Los Angeles County Department of Charities as appropriate work for petitioner to perform (G.X. 62), obtained the approval of the Director of Selective Service (G.X. 63–65), and directed petitioner to report for work at that position (G.X. 67–68). Petitioner reported to the prospective employer, but refused any and all work assignments (G.X. 71).

The court of appeals rejected petitioner's contention that his assignment to work as an institutional helper was unlawful because the local board failed to consider the appropriateness to the national interest of his offer to work as an animal keeper. It held that, to the contrary, the board determined that employment as an animal keeper would not be in the national interest, as evidenced by its statement to him, at the meeting attended by the representative of the state director, that it did not recognize all government jobs as fulfilling the Selective Service obligation (Pet. App. A4–A6; 402 F.2d at 539–540).[4] The dissenting judge

[4] The court also stated, in reliance upon its prior decision in *Mang* v. *United States*, 339 F.2d 369, that "there is no failure of due process or abdication of authority if a local board is guided by an approved list of acceptable civilian employments." In its view of the facts, however, it was unnecessary to reach the point (Pet. App. A3; 402 F.2d at 538) (the words "is guided" are not italicized in the opinion).

found that the board did not in fact consider the appropriateness of petitioner's offer, but rejected the offer solely because the position was not on the approved list provided by the state director (Pet. App. A10–A11; 402 F.2d at 541–542). He contended that the "relevant provision of [Selective Service Regulation 1660.20(b)] unambiguously states that before the board is to submit its own choice of work to the registrant, the *local board* is to *find* that none of the types of work properly requested by the registrant is appropriate" (Pet. App. A11; 402 F.2d at 542).

ARGUMENT

1. The underlying statute, 50 U.S.C. App. 456(j)—which provides that conscientious objectors shall be ordered to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board [pursuant to Presidential regulations] may deem appropriate"—does not purport to vest objectors with a right to select the specific public service job with a particular employer at which they will perform their alternative civilian service. See *Klubnikin* v. *United States*, 227 F. 2d 87, 90 (C.A. 9), certiorari denied, 350 U.S. 975. Nor can the Selective Service Regulations be said to vest objectors with such a right. To the contrary, a fair reading of the regulations indicate that they are intended to do no more than provide a procedure whereby some accommodation of the work wishes of objectors is possible, but without

mandating complete accommodation. The Regulations do not permit objectors to insist, as petitioner has done, upon a single specific job with a particular employer. Rather, Regulation 1660.20(a) (Pet. App. A20) merely permits them to submit to the local board three "types" of civilian work, thus leaving scope for the board both to choose from among the three types of work submitted and to designate the particular employer for whom the work shall be done. Moreover, the board is not required to make a formal and affirmative finding that none of the three types of work submitted is appropriate before it can reject them. Rather, an objector is to be assigned to one of the types of work he has offered to perform only if the board "deems" one of them to be appropriate.[5] There is nothing in the language of the Regulations, any more than in the language of the statute, which bars the board from limiting the types of work it deems appropriate to those appearing on the state director's list, so long as it is not shown that the list was improperly composed. *United States* v. *Lawson*, 337 F. 2d 800, 816 (C.A. 3), certiorari denied, 380

[5] Regulation 1660.20(b) does provide that the board shall countersubmit three types of work to the objector if it "finds" that none of the types of work he has submitted is appropriate. When read in light of the language of Regulation 1660.20(a), however, as well as of that of the other Regulations, the word "finds" would not appear to contemplate formal and affirmative findings.

U.S. 919; *Mang* v. *United States*, 339 F. 2d 369, 370 (C.A. 9).[6]

In any event, since petitioner failed to submit *three* types of proposed work to the board, as required by Regulation 1660.20(a), the board properly countersubmitted three types of proposed work to him in accordance with Regulation 1660.20(b). Thereafter all of the procedural requirements of the Regulations were followed, and petitioner was even extended an opportunity, during the meeting held pursuant to Regulation 1660.20(c) at which mutual agreement was sought, to choose any other type of work from the approved list in addition to the three which had previously been offered to him. He was assigned the employment which he refused to accept only after he insisted that he would accept only the position as animal keeper which he then held with the Los Angeles Zoo. There was, therefore, no lack of due process or failure to follow the Regulations in the assignment to him of the employment which he was convicted of refusing to accept.

2. Moreover, even if it were thought that the board was required to consider the merits of petitioner's work offer, the court of appeals correctly held that the board did so. Clearly there was no requirement that the board embody the results of its consideration in formal findings. The employment upon which peti-

[6] The dissenting opinion reads *Mang* to hold only that the board may be "guided" by the state director's list, but not "bound" by it (Pet. App. A13; 402 F. 2d at 543). In *Mang*, however, as well as in *Lawson*, the boards, as here, limited the employers and positions they deemed appropriate to those appearing upon the respective state director's lists.

tioner insisted was not the proper type for fulfilling his service obligation—it was his regular employment, entered into prior to the time he was classified 1–O and in a line of work which he first commenced following before he had applied for conscientious objector status.[7] While "[t]he intent of the law in regard to conscientious objectors is not penal" (Pet. 6), the statute was not meant to exempt objectors, because of their status, from the temporary career disruption and other sacrifices which non-objectors are made to suffer.[8] The board must be presumed to have had this consideration in mind when it rejected petitioner's work offer, and the fact that it did was evidenced by its remarks to him at the Regulation 1660.20(c) meeting (see Pet. App. A3–A6, n. 2). Although this meeting was held after the board had initially rejected his offer, there is no reason to assume that this consideration did not suggest itself to the board until that time. Compare *Estep* v. *United States*, 327 U.S. 114, 122; *Lewis* v. *United States*, 279 U.S. 63, 73.

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[7] Petitioner's starting salary as animal keeper was $484 per month, and at the time of trial he was earning $505 per month (II R. 19). The job he was ordered to report to paid $53.60 per week; the other two positions which were offered to him paid, respectively, $125 to $150 per month and $255 to $281 per month (G.X. 51, 52).

[8] Thus, for example, Regulation 1660.21(a) (Pet. App. A22) provides that objectors shall not be assigned to employment in their local communities unless "in a particular case" the board deems such assignment to be "desirable in the national interest."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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